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No. 1063

In the Supreme Court of the United States

OCTOBER TERM, 1962

WM. H. SIMMONS, *Petitioner,*

vs.

THE STATE OF WASHINGTON, on the Relation of Charles O. Carroll, Prosecuting Attorney for the County of King, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

CHARLES O. CARROLL
King County Prosecuting Attorney

JAMES E. KENNEDY
Deputy Prosecuting Attorney
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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Washington State Supreme Court *State ex rel. Carroll v. Simmons* is reported at 161 Wash. Dec. 144, 61 Wn.(2d) ....., 377 P.(2d) 421. App. p. 13 of petition. The opinion was filed December 27, 1962.

JURISDICTION

Petitioner contends that jurisdiction to review the judgment of the Washington State Supreme Court is conferred on this court by 28 U.S.C. 1257. However, that statute does not confer jurisdiction on this court to hear moot questions. As petitioner states at pages 2 and 3 of his petition, he was elected in November, 1958, to a four-year term of office and was ousted from office by *quo warranto* proceedings in 1961. The official records of the King County Auditor show that in 1962,

petitioner filed and ran for election for the term of office following the term for which petitioner was elected in 1958; that petitioner was defeated in the primary election held September 11, 1962; and that the successor to the term for which petitioner was elected in 1958 has been elected and qualified and taken office (King County Auditor File Numbers 38935, 3591462, 3910041, 39225, 4247298, Official Canvas of Elections for 1962).

Hence, it appears that the question presented here was moot before the petition herein was filed in April, 1963. There is nothing now in controversy in this case because the term of office in issue has ceased to exist. Under these circumstances, this court can do no more than declare principles or rules of law for the government of future cases which cannot affect the result as to the thing in issue in this case. This the court will not do. *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 314, 13 S.Ct. 876, 37 L.ed. 747; *U. S. v. Hamburg Amerikanische Packet-Fahrt-Artien Gellschaft*, 239 U.S. 466, 475-476, 36 S.Ct. 212, 60 L.ed. 387; *U. S. v. Alaska S. S. Co.*, 253 U.S. 113, 116, 40 S.Ct. 448, 64 L.ed. 808; *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 289, 37 S.Ct. 287, 61 L.ed. 722.

For these reasons, it is respectfully suggested that this court does not have jurisdiction to review the instant case for the reason that it became moot prior to the time the petition for certiorari herein was filed.

QUESTION PRESENTED

When an elected municipal judge becomes disqualified for his elective office for the reason that he has been convicted of a felony and is ousted from that office in

a judicial trial held according to long standing statutory *quo warranto* procedures is the statute defining the disqualification a bill of attainder under the United States Constitution, or the judicial trial a violation of the due process and equal protection clause of the 14th Amendment to the Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

"No State shall . . . pass any bill of attainder . . ." Article I, § 10, Constitution of United States.

". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV, Constitution of United States.

Section 7.56.010 of the Revised Code of Washington provides as follows:

"*Against whom information may be filed.* An information may be filed against any person or corporation in the following cases:

"(1) When any person shall usurp, intrude upon, or unlawfully hold or exercise any public office or franchise within the state, or any office in any corporation created by the authority of the state.

"(2) When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office.

"(3) When several persons claim to be entitled to the same office or franchise, one information may be filed against any or all such persons in order to try their respective rights to the office or franchise.

"(4) When any association or number of persons shall act within this state as a corporation, without being legally incorporated.

"(5) Or where any corporation do, or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law."

Section 7.56.100 of the Revised Code of Washington provides as follows:

"*Judgment of ouster or forfeiture.* Whenever any defendant shall be found guilty of any usurpation of or intrusion into, or unlawfully exercising any office or franchise within this state, or any office in any corporation created by the authority of this state, or when any public officer thus charged shall be found guilty of having done or suffered any act which by the provisions of the law shall work a forfeiture of his office, or when any association or number of persons shall be found guilty of having acted as a corporation without having been legally incorporated, the court shall give judgment of ouster against the defendant or defendants, and exclude him or them from the office, franchise or corporate rights, and in case of corporations that the same shall be dissolved, and the court shall adjudge costs in favor of the plaintiff."

Section 9.92.120 of the Revised Code of Washington provides as follows:

"*Conviction of public officer forfeits trust.* The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state."

STATEMENT OF THE CASE

In November, 1958, petitioner was elected to a four-year term of office as municipal judge for the City of Seattle.

On February 21, 1961, petitioner was sentenced to not more than ten years in the Washington State Penitentiary for the crime of Assault in the Second Degree. That conviction was appealed.

On March 7, 1961, while the appeal from the above felony conviction was pending, the *quo warranto* proceedings in the instant case were commenced, and petitioner was ousted from office in those proceedings on April 20, 1961.

On May 19, 1961, petitioner gave notice of appeal from the *quo warranto* judgment. Petitioner did not perfect that appeal until he filed his brief, eleven months after the *quo warranto* judgment, on March 19, 1962.

On December 27, 1962, the Washington State Supreme Court filed its opinion affirming the trial court's judgment in the *quo warranto* proceedings.

ARGUMENT

Since the disability created by RCW 9.92.120 was imposed on petitioner only by means of a judicial trial, this statute is not a bill of attainder. A bill of attainder is defined in *U. S. v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1945). In that opinion at page 315, it is held:

> "... that legislative acts, no matter what their form, that apply either to named individuals or to

> easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The following history of the proceedings in petitioner's trial in the *quo warranto* action (which is related in the appendix of petitioner's brief at pages 13 to 15, and in the opinion below, 161 Wash. Dec. 144, 377 P. (2d) 421) shows that petitioner, in the *quo warranto* proceedings, had a full scale judicial trial on the issues.

> "The . . . [petitioner] William H. Simmons, Judge of the Municipal Court of the City of Seattle, was convicted of the crime of assault in the second degree by jury trial on December 7, 1960. Judgment and sentence was entered on February 21, 1961. A twenty days' notice and summons and an information in *quo warranto* were served upon the . . . [petitioner] and were filed on March 7, 1961.
>
> "On the same day, an *ex parte* application by the . . . [respondent] State of Washington for an order to restrain the . . . [petitioner] temporarily from acting as municipal court judge was made to the Superior Court for King County. It was supported by an affidavit stating that the . . . [petitioner] had been convicted of the crime of second-degree assault and that he had forfeited his office under RCW 9.92.120 by reason of the conviction. An order was issued and served upon the . . . [petitioner] directing him to show cause on the following day why he should not be restrained from performing the duties of his office pending the final determination of the issues in the *quo warranto* proceeding.
>
> "On March 8, 1961, the . . . [petitioner] appeared

personally and moved to quash the order to show cause for the reason that the court had no jurisdiction to issue the order. The motion was orally denied. Pursuant to a hearing upon the show cause order a temporary injunction was entered on March 9, 1961, restraining the . . . [petitioner] from the performance of the duties of his office.

"On March 27, 1961, the . . . [petitioner] served and filed certain motions challenging the sufficiency of the information and sought to have certain portions of the information stricken and to require the . . . [respondent] to make an election as to whether the *quo warranto* proceeding was brought to determine the authority of . . . [petitioner] to hold his office, to oust the . . . [petitioner] from his office, or because the . . . [petitioner] had failed to vacate his office. . . . [Petitioner] further moved that the *quo warranto* proceeding be dismissed for failure to join an indispensable party.

"On March 28, 1961, the . . . [respondent] filed a motion for summary judgment, as a matter of law upon the pleadings, supported by affidavit stating there was no issue of fact present in the cause.

"On April 3, 1961, the . . . [petitioner's] motions were brought on for hearing. The ruling on the motion to dismiss for lack of jurisdiction over the . . . [petitioner] was reserved until 9 a.m. on April 7, 1961. The remainder of the motions were denied except the motion to strike certain paragraphs from the *quo warranto* information which was granted, but which is not raised as an issue on this appeal.

"On April 7, 1961, the motion to dismiss for lack of jurisdiction over the . . . [petitioner] was denied.

"On April 11, 1961, the . . . [petitioner] filed

the following objections to the summary judgment proceedings:

"'1. The Court has no jurisdiction of the subject matter of the cause.

"'2. The . . . [respondent's] motion is not timely in that . . . [petitioner's] motions heretofore filed and served remain undisposed of.

"'3. The affidavit in support of . . . [respondent's] motion for summary judgment does not establish a basis for entry of summary judgment.'

"On April 14, 1961 . . . [respondent] served and filed notice of presentation of order granting summary judgment, findings of fact and judgment of ouster to be heard on April 20, 1961. On April 20, without taking testimony, the . . . [respondent's] motion for summary judgment was granted and the court entered findings of fact, conclusions of law and judgment forfeiting the . . . [petitioner's] office and ousting him thereof."

Clearly the above history, with which petitioner has no quarrel conclusively shows that the proceedings complained of were in no way ". . . a legislative act which inflicts punishment without a judicial trial." *Cummings v. Mo.*, 4 Wall. 277, 323, 71 U.S. 277 (1866).

Further indication that RCW 9.92.120 is not a bill of attainder is found in RCW 7.56.010, which provides *inter alia*:

"*Against whom information may be filed.* An information may be filed against any person or corporation in the following cases:

"* * * *

"(2) When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office."

And in RCW 7.56.100, which provides *inter alia*:

> "*Judgment of ouster or forfeiture*. . . . when any public officer thus charged shall be found guilty of having done or suffered any act which by the provisions of the law shall work a forfeiture of his office, . . . the court shall give judgment of ouster against the defendant or defendants, and exclude him or them from the office. . . ."

Clearly Washington law contemplates that RCW 9.92.120 shall be implemented only by voluntary vacation of office or by a judicial trial held according to the appropriate *quo warranto* procedures. Petitioner makes no claim that the *quo warranto* statutes are invalid nor that the procedures prescribed therein were not followed.

In the instant case, there is no question of a denial of due process since petitioner had notice and an opportunity to be heard before the Superior Court of the State of Washington in and for King County, which is a court of record in the state of Washington. That the petitioner took full advantage of this notice and opportunity to be heard is amply shown by the recitation of his maneuvers and appearances set out above and in the Washington State Supreme Court opinion for which review is sought, 161 Wash. Dec. 144, 145-147, 377 P.(2d) 421 (App. pp. 13-15 of petition). So, also, has petitioner received equal protection of the law in this case. The procedures and rules followed herein are identical to those which have been followed in Washington ever since the legislature in 1909 enacted this disqualification for holding public office. *State ex rel. Zempel v. Twitchell*, 59 Wn.(2d) 419, 367 P.(2d) 985

(1962); *State ex rel. Knabb v. Frater*, 198 Wash. 675, 89 P.(2d) 1046 (1959); *State ex rel. Guthrie v. Chapman*, 187 Wash. 327, 60 P.(2d) 245 (1936).

CONCLUSION

First, the petition itself shows there is no controversy because the case has become moot and, second, the petition has failed to indicate any violation of the Federal Constitution, therefore it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES O. CARROLL
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JAMES E. KENNEDY
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Counsel for Respondent.